

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

AT&T Corporation and Tele-Communications, Inc.)
Application for Transfer of Control of Cable)
Licenses under Section 310(d) of the)
Communications Act of 1934)

CS Docket 98-178

REPLY COMMENTS OF MINDSPRING ENTERPRISES, INC.

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MindSpring Enterprises, Inc. ("MindSpring") submits its reply to the comments of other parties in response to the Cable Services Bureau's Public Notice regarding the above-captioned application (released September 29, 1998).

INTRODUCTION

As MindSpring explained in its initial comments in this proceeding, we are one of the nation's leading Internet Service Providers, with a particular focus on residential and small business customers.¹/ MindSpring and other independent ISPs are "Exhibit 1" demonstrating the crucial importance of preserving low entry barriers for innovative new firms in the Internet connectivity market. Unless these low entry barriers also apply with respect to broadband services over cable loops, then it is likely that most residential consumers will be

¹ See MindSpring Comments at 1-2. (Unless otherwise indicated, all references to comments of parties refer to their comments filed October 29, 1998, in response to the public notice of this application).

unable to access the ISP – and the resulting innovation, service, and information – of their choice.

All of the commentators in this proceeding echoed in one form or another MindSpring's comments, particularly with respect to the need for the Commission to ensure that the United States continues to have an "Open Systems" environment for the provision of Internet services. To this end, the comments supported application of an "equal access" regime to cable facilities used for the provision of two-way, interconnected telecommunications. Absent action by the Commission to require such a regime, the comments were clear that the merged AT&T / TCI entity (hereinafter "AT&T") created through approval of the above captioned application would have strong incentives to use its commanding market power to disadvantage unaffiliated ISPs, as well as competitive local exchange carriers (CLECs) seeking to provide advanced telecommunications services.

These reply comments highlight the unanimous view of the commentators that AT&T has a strong economic incentive to discriminate in favor of its own affiliated ISP, discuss the reasons that the two-way transmission of user selected information over interconnected cable facilities means that such facilities are no longer a cable system to the extent of such transmissions, and demonstrate that Congress has already provided the appropriate regime to ensure "equal access" for all ISPs to such transmission capability through section 251 of the Communications Act. MindSpring urges the Commission to clarify in its approval of this application that cable facilities offered to the public for the two-way, interconnected transmission of information of the subscriber's choosing are engaged in telecommunications service subject to title II of the Communications Act.

As discussed further below, numerous commentators agreed with MindSpring that the provision of two-way transmission services over interconnected networks does not constitute “cable service” as defined in section 602 of the Communications Act of 1934 (Communications Act).^{2/} Cable service involves the one-way transmission to subscribers of video programming and other programming services. Even with the addition of “or use” to the definition through an amendment in the Telecommunications Act of 1996, a facility only meets the definition of cable service to the extent that such facility engages in the transmission of video programming and other programming services to subscribers over closed transmission links (i.e., the subscriber cannot generally select and transmit information on a two way basis, other than to the extent necessary to interact with a video program or other programming service also provided to all subscribers on the same “closed” transmission facility, which in terms of the cable network could be understood to be the facility providing primarily one-way service within the local franchise area). To the extent that AT&T’s cable facilities remain so engaged after approval of this application, then such facilities should remain a cable system subject to title VI of the Communications Act. Finally, MindSpring joins numerous other commentators in urging the Commission to require as a condition of approval of this application that its unbundling and equal access rules^{3/} apply with respect to AT&T’s cable facilities that are engaged in the two-way, interconnected transmission of subscriber selected information.

^{2/} 47 U.S.C. 522.

^{3/} See 47 C.F.R. 64.702.

I. OTHER COMMENTATORS PROVIDED STRONG SUPPORT FOR MINDSPRING'S INITIAL COMMENTS THAT AT&T WILL HAVE A STRONG INCENTIVE TO FAVOR THEIR OWN AFFILIATED ISP

Numerous commentators noted that AT&T will have tremendous market power after approval of this application. AT&T will control cable facilities that provide them direct access to over 33 million local cable loops,^{4/} which means that they will rank ahead of Ameritech, US West, and all of the independent incumbent local exchange carriers (ILECs).^{5/} @Home, TCI's affiliated ISP service, is the only high-speed cable Internet access service available to over 58 million homes under the exclusive contract arrangements that TCI has with its consortium of 18 other large Multiple System Operators (MSOs). This is over one-half of U.S. households passed by cable facilities. Indeed, AT&T's chairman was reported in the press to have said that he is seeking "to cement deals with cable partners to extend AT&T's reach to 60 percent of U.S. homes."^{6/} If Road Runner, the other exclusive high-speed cable Internet access service which reaches 27 million homes is considered, over 75 percent of U.S. households currently have only one choice if they want high speed cable access to the Internet.^{7/}

⁴ See Qwest Comments at 1, AOL Comments at 8.

⁵ See Qwest Comments at 13. See also 47 U.S.C. 251(h)(1) (definition of "incumbent local exchange carrier").

⁶ "Time Warner, AT&T Discuss Phone Venture"; Wall Street Journal at B1 and B16 (October 22, 1998).

⁷ See AOL at 9 and 48.

This means that AT&T will “have both the incentive and the ability to discriminate.”^{8/} In fact, as numerous commentators noted, Mr. Hindery, the current president of TCI, testified before the Commission and has told the press that AT&T cable subscribers will have to “go through” @Home in order to reach the ISP of their choice.^{9/} The FCC has repeatedly recognized the value of “one stop” shopping, which the requirement to use @Home unfairly facilities.^{10/} Consumers should not have to pay twice to reach the Internet content provider of their choice. To permit AT&T to require them to do so will deny consumers the benefit of technology innovation, customer service, and information diversity offered by independent ISPs,^{11/} as well as seriously undermine the “vibrant and competitive free market that presently exists for the Internet....”^{12/}

To that end MindSpring agrees with the comments of the Consumers Union et al, who stated so accurately that:

“the AT&T/TCI business plan is contrary to the public interest. It is the same anti-competitive model that the cable industry used to acquire monopoly power and restrict program diversity in cable television. Offering Internet service under the closed cable TV system model will, quite literally, change the character of the Internet...”^{13/}

⁸ Sprint Comments at 19. See also SBC Comments at 15 (AT&T will have every incentive to favor @Home), Echostar Comments at 6 (ISPs have reason to be concerned that AT&T will combine access with content to the exclusion of alternative sources).

⁹ See Consumers Union et al Comments at 12-13, MCI Comments at 12.

¹⁰ See SBC at 3-4.

¹¹ See MindSpring Comments at 9-14.

¹² 47 U.S.C. 230(b)(2).

¹³ Consumer Union et al Comments at 11.

To correct this problem, the Commission must ensure that the closed cable system model is not applied to the underlying broadband telecommunications capacity that is necessary to permit ISPs and other information service providers to offer their services.

II. THE TWO-WAY TRANSMISSION OF SUBSCRIBER SELECTED INFORMATION OVER INTERCONNECTED NETWORKS DOES NOT MEET THE DEFINITION OF “CABLE SERVICE” AND SHOULD BE PROPERLY CLASSIFIED AS “TELECOMMUNICATIONS.”

MCI Worldcom agrees with MindSpring that Internet services provided over cable facilities do not meet the definition of “cable services” in section 602 of the Communications Act.^{14/} “Cable service” is defined as “(A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other program service.”^{15/} Further, a “cable system” is defined as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming... such term does not include ... (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of [the Communications] Act, except that such facility shall be considered a cable system *to the extent such facility is used to provide video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand*

¹⁴ 47 U.S.C. 522. See MCI Worldcom at 3 (“Most services currently classed as information or internet services do not meet statutory definition of cable service.”). See also MindSpring Comments at 20-21.

¹⁵ 47 U.S.C. 522(6).

services....”^{16/} The combined effect of these two definitions is that cable services are one-way services provided to subscribers over a closed set of transmission paths. This description clearly does not include the two-way, interconnected transmissions that characterize Internet services and other information services.^{17/} Nor does it fit with AT&T’s own description of their planned cable facility upgrade.¹⁸

The cable industry argues that the addition of the term “or use” to the definition of “cable service” in the Telecommunications Act of 1996 (Telecommunications Act) was intended by Congress to permit cable operators to provide Internet services and information services without subjecting the cable facilities to common carrier regulation under title II of the Communications Act.^{19/} Since most Internet services clearly do not fit the definition of “video programming”^{20/} then they have to be “other programming services” if the cable industry argument is correct. “Other programming service” is defined as “information that a

¹⁶ 47 U.S.C. 522(7) (emphasis added).

¹⁷ In fact, the definition of “information services” in section 3 of the Communications Act states that the capability is provided “via telecommunications...” 47 U.S.C. 153(20). “Telecommunications” is defined in section 3 of the Communications Act to mean “the transmission, between or among points specified by the user, of information of the user’s choosing...” 47 U.S.C. 153(43). Since cable service is a one way transmission to the user, by definition it does not involve “points specified by the user” or “information of the user’s choosing.”

¹⁸ See Ameritech Comments at Attachment A (AT&T diagrams labeled “Upgrade of Cable System to Increase Capacity and Create Two-Way Capabilities” and “Fully Integrated Packet Data Solution”). These diagrams clearly indicate that the AT&T cable facility will be a two way transmission system that is fully interconnected (i.e., “open”) to other public networks.

¹⁹ See Barbara Esbin, Internet Over Cable: Defining the Future in Terms of the Past, Federal Communications Commission OPP Working Paper #30 (August 1998) at 4 and note 14.

cable operator makes available to all subscribers generally.”^{21/} That Congress did not amend the term “information” to read “information service” at the same time they added the term “or use” would seem to speak directly to the point that Congress clearly did not intend to include in “other programming services” the much broader category of “information services.”^{22/}

If the cable industry argument were in fact correct, which it is not, then it would appear that ISPs seeking to reach cable subscribers directly would have no option (except indirectly through a cable affiliated ISP like @Home) other than the “commercial use” channels set aside for use by non-affiliate providers under section 612 of the Communications Act.^{23/} However, section 612(b)(5) would appear to preclude such access for ISPs, since it explicitly limits the definition of “commercial use” to “the provision of video programming.”^{24/} Given that Congress made numerous other changes to title VI of the Communications Act (governing cable services), including adding an entire new Part V on the provision of cable services by telephone companies, it is simply absurd to believe that

²⁰ “Video programming” is defined in section 602(20) of the Communications Act to mean “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. 522(20).

²¹ 47 U.S.C. 522(14).

²² “Information service” is defined as “the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...” 47 U.S.C. 153(20). Nothing in “information that a cable operator makes available to subscribers” suggests anything more than the broadcast of information without substantial subscriber interaction.

²³ 47 U.S.C. 532.

²⁴ 47 U.S.C. 532(b)(5). It is interesting to note that “other programming services” are also not included in this definition.

Congress failed to address access to this medium for information service providers and competitive local exchange carriers.^{25/}

In fact, new section 651(b) of the Communications Act would appear to address the issue directly. Section 651(b) provides that “[a] local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to title II of [the Communications] Act, to make capacity available on a non-discriminatory basis to any other person for the provision of a cable service directly to subscribers.”^{26/} If the Commission were to adopt the cable industry position that the addition of “or use” permits Internet services and information services to be provided as a “cable service,” then section 651(b) would appear to allow a local exchange carrier currently subject to the Commission’s equal access, interconnection, resale, and unbundling rules to prevent ISPs or any other information service provider from being able to obtain capacity on their network under title II to provide those services. Further, the legislative history for that section makes clear that a local exchange carrier’s existing network could be used to provide both common carrier services and cable service over the same facility.^{27/} The cable industry interpretation would result in it being left to the local exchange carrier to determine the regulatory classification of

²⁵ See Title III of the Telecommunications Act of 1996, making numerous changes to Title VI of the Communications Act.

²⁶ 47 U.S.C. 571(b).

²⁷ See “Conference Report to Accompany S. 652,” United States House of Representatives Report 104-458 at 172 (“a local exchange carrier that utilizes its own telephone exchange facilities and services to provide cable services... is required by such use only to make cable and video programming capacity and facilities available to others for the provision of cable service to the extent provided under parts I through IV of title VI, *regardless of whether those facilities are also used to provide telephone exchange service under title II.*”) (emphasis added).

Internet and information services. As long as the local exchange carrier offered even one channel of TV broadcast-like programming, it could fence off access to its “cable system” for Internet services and information services. Such a result so clearly conflicts with Congressional intent that it should be rejected out of hand. A more rational approach to the changes made by Congress in the Telecommunications Act are that they intended for the two-way transmission over interconnected networks of Internet services or information services to be governed under the title II common carrier regime, which already provides for equal access, interconnection, and unbundling requirements that would address most concerns raised by commentators concerned about access to cable facility subscribers for the provision of telecommunications or information services.

III. ALL COMMENTATORS AGREED THAT THE COMMISSION SHOULD REQUIRE SOME FORM OF EQUAL ACCESS TO, AND UNBUNDLING OF, TRANSMISSION CAPACITY PROVIDED OVER CABLE FACILITIES.

All of the parties commenting on the AT&T application with respect to access to the “last mile” or cable transmission facilities urged the Commission to condition approval on some form of equal access and interconnection obligation.^{28/} Most argued alternative theories, that the Commission should either require such access and interconnection as a condition of approving the application or should use approval to find that AT&T should be subject to varying requirements of section 251 of the Communications Act. MindSpring supports the later approach because, as outlined above, it is the one most consistent with the Communications Act and because it provides the proper precedent for access to cable facilities

²⁸ See MCI Worldcom Comments at 2, Qwest Comments at 1, Sprint Comments at 21, Ameritech at 12, AOL at 33.

used to provide Internet services and information services to the other cable subscribers not reached by the new AT&T network. Cable modem subscribers currently outnumber ADSL subscribers 10 to 1, and that ratio is likely to grow in cable's favor over the next several years, particularly once the AT&T application is approved.^{29/} At least for the foreseeable future, cable facilities are going to be a major, if not the only, widely deployed option in the residential broadband access market. As a result, it is critical to the continued growth of the Internet that all ISPs have access to the means to reach consumers.

CONCLUSION

The Commission should approve the AT&T application after clarifying that AT&T's cable facilities are subject to regulation under title II of the Communications Act to the extent that they are used to provide telecommunications services, including the transmission of Internet services and other information services. In addition, given AT&T's dominant position in the local access market with the acquisition of TCI's cable facilities, those facilities should be subject to the Commission's unbundling and equal access rules. This will ensure that ISPs and other information service providers can continue to obtain the necessary telecommunications services to provide their information services directly to subscribers.

By maintaining an "Open System" world regardless of the facilities used, the Commission is giving full meaning and effect to the pro-competitive policies Congress enacted in the Telecommunications Act. Those policies have worked in the past to foster the growth of the Internet, and will continue to ensure that consumers will continue to have access to the ISP

²⁹ See AOL Comments at 53 and footnote 125.

of their choice for technology innovation, service competition and customer support, and information diversity.

In closing, MindSpring reiterates that it believes that last mile owners that are taking risks and investing in infrastructure such as two-way capable cable plant should reap a generous reward on their investment. But the way to earn that reward is not through monopoly or duopoly control of the residential telecom markets of the future.^{30/} By clarifying that two-way transmissions over interconnected networks are telecommunications and imposing a reasonable unbundling and equal access requirement as a condition of approving the joint application of AT&T and TCI, the Commission will take a large step forward to assure that those changes lead to more competition and more diversity in services and information, rather than a concentration of power at the local loop.

Respectfully submitted,

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November 13, 1998

³⁰ MindSpring does not believe these requirements will diminish AT&T's incentive to invest in broadband technology. Accord AOL Comments at 36-37 (open access and interconnection will not diminish incentive to invest in broadband capacity).

Certificate of Service

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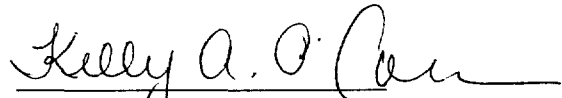
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